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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, et al.,
Petitioners,

v.

ROBERT P. CASEY, et al.,
Respondents.

ROBERT P. CASEY, et. al.,
Petitioners,

v.

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, et al.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SOUTHERN CENTER FOR LAW & ETHICS AS AMICUS CURIAE IN SUPPORT OF ROBERT P. CASEY, ET AL.

TONY G. MILLER*
Southern Center for Law & Ethics
P.O. Box 380113
Birmingham, Alabama 35238
(205) 871-6137

DAVID M. SMOLIN
Associate Professor of Law
Cumberland School of Law
Samford University
Birmingham, Alabama 35229
(205) 870-2418

**Counsel of Record*

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INTEREST OF AMICUS CURIAE

Amicus curiae, The Southern Center for Law & Ethics (the "Center") is a non-profit corporation founded in January 1985 and based in Birmingham, Alabama. The Executive Director of the Center is J. Scott Houser, and policies are set by a board of directors consisting of four attorneys and six lay persons. The Center furnishes legal counsel and files amicus curiae briefs on a variety of issues, including family and reproductive issues. The Center has been particularly active, through litigation and scholarship, in seeking to develop and promote a proper understanding of the constitutional right of privacy. Thus, the Center has submitted *amicus curiae* briefs in past abortion cases, including *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and in a pending Seventh Circuit case concerning midwifery. *See Peckmann v. Thompson*, Nos. 90-3334 & 90-3445, (7th Cir.) (amicus brief filed Aug. 12, 1991 concerning midwifery and privacy). In addition, the Center has received inquiries from midwives and home-schooling families concerning appropriate responses to state interference with the practices of home birth and home schooling.

The Center has been supportive of the overruling of *Roe v. Wade*, 410 U.S. 113 (1973), but is particularly concerned that such overturning might lead to an overall weakening of legitimate privacy interests. Thus, an important purpose of this *Amicus* brief is to provide support for a strengthened and reconceptualized privacy right that can survive the demise of *Roe*. Counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court properly and legitimately protected a fundamental right of family privacy from its decision in *Meyer v. Nebraska* in 1923 through *Loving v. Virginia* in 1967. This right of family privacy incorporated into the due process clause certain implicit American traditions and understandings regarding the primacy of the family, and family relationships, in relation to

the state. The second Justice Harlan and others made it clear that this realm of family privacy did not extend to traditionally disfavored conduct such as homosexuality, adultery, and fornication. *See Poe v. Ullman*, 367 U.S. 497, 545-46 (1961) (Harlan, J., dissenting).

In dictum in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), and in its holding in *Roe v. Wade*, 410 U.S. 113 (1973), this Court created an entirely new "privacy" right which has threatened to displace and destroy the Court's prior half-century heritage of protecting family privacy. This new privacy right often favors the "purposeful termination of a potential life," *Harris v. McRae*, 448 U.S. 297, 325 (1980), above the constructive act of childbirth as a part of its generalized constitutional preference for the unconventional over the conventional. *See Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (plurality opinion). These preferences for the "inherently different," *Roe v. Wade*, 410 U.S. 113, 159 (1973), and destructive act of abortion, over traditionally-protected procreative and parental rights and interests, "radically departs" from "the balance which our Nation . . . has struck between . . . liberty and the demands of organized society." *See Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

Pennsylvania's modest regulations of abortion in the name of prenatal life, the right of procreation, and parental care and authority give this Court an opportunity to choose between two kinds of privacy: the theory of family privacy protected by this Court for approximately one-half century prior to *Roe v. Wade*, and the newer abortion and autonomy privacy that is less than two decades old. Rejection of the abortion right in the name of family and procreative interests would assist the process of restoring the legitimacy of privacy.

The overruling of *Roe v. Wade* would not affect *Griswold v. Connecticut*'s holding that marital intimacy and marital contraceptive use are constitutionally protected. *Griswold*'s protection of marital intimacy is well within the doctrine of family privacy, and *Griswold*'s protection of marital contraceptive use is a proper corollary of its protection of marital intimacy. By

contrast, *Roe v. Wade* is by its own terms, and necessarily, a case about the "inherently different" and destructive "purposeful termination of a potential life."

The overruling of *Roe v. Wade* would not require the reversal of *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977). *Eisenstadt* and *Carey* are based primarily on the finding that it is irrational to punish nonmarital sexuality by limiting access to contraceptives. In addition, this Court can sever abortion from the realm of fundamental privacy rights because of its "inherently different" and inherently destructive effect of "terminat[ing] a potential life." Such a holding would not require any reexamination of this Court's contraception holdings, because this Court has already acknowledged that abortion is "inherently different" from contraception. *See Roe*, 410 U.S. at 159 (abortion inherently different from situation addressed in *Eisenstadt*); *Harris v. McRae*, 448 U.S. at 325 (abortion inherently different from other medical procedures).

This Court is perfectly capable of drawing a constitutional line between contraception and abortion, and such line would be practically and constitutionally superior to *Roe*'s reliance on birth and viability as lines of demarcation. Such a line can be drawn without subjecting current forms of contraception, such as the IUD and oral contraceptives, to intrusive state regulation.

The overruling of *Roe v. Wade* would not permit state-coerced abortion or contraception. The fifty years of family privacy precedents that preceded *Roe* provide ample protection against state-coerced abortion or contraception. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (Constitution rejects Plato's proposed eugenic infanticide and similar proposals inimical to American institutions); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (marriage and procreation are fundamental rights); *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion) (due process clause prevents "future generations from lightly casting aside important traditional values").

ARGUMENT

I. THIS CASE OFFERS THE COURT AN OPPORTUNITY TO RESTORE THE LEGITIMACY OF THE CONSTITUTIONAL RIGHT OF PRIVACY

The constitutional right of privacy is a legitimate and important part of "the balance which our Nation . . . has struck between . . . liberty and the demands of organized society." *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Unfortunately, *Roe v. Wade* "radically departs" from the balance of our living constitutional tradition, *see id.*, causing many to question the very legitimacy of privacy itself. This case offers the Court an opportunity to restore the legitimacy of privacy, by properly distinguishing between legitimate and illegitimate privacy claims.[1]

This case involves a conflict between the abortion right created in *Roe* and previously recognized privacy rights that the *Roe* Court claimed were the foundations of *Roe*. Thus, Pennsylvania's efforts to safeguard and recognize the right to procreate, the right to protect one's offspring, and parental rights over decisionmaking by a minor daughter, here collide with *Roe*'s abortion right. In addition, Pennsylvania is seeking to protect prenatal life. Upon examination, it is the rights and interests Pennsylvania is seeking to safeguard and recognize, rather than the abortion liberty with which Pennsylvania's statutes[2] allegedly interfere, that ought to receive greater solicitude and protection by this Court.

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[1] A more fully developed analysis of privacy law, which forms much of the basis of this brief, will appear in a forthcoming article, David M. Smolin, *The Jurisprudence of Privacy in a Conservative Supreme Court*, 75 Marq. L. Rev. (forthcoming 1992).

[2] *See* 18 Pa. Cons. Stat. Ann. §§ 3203, 3205, 3206, 3209, 3207, 3214 (Supp. 1991) (definition of medical emergency, informed consent, parent consent, spousal notice, reporting requirements).

II. THIS COURT PROPERLY PROTECTED THE REALM OF FAMILY LIFE FOR APPROXIMATELY ONE-HALF CENTURY PRIOR TO *ROE V. WADE*

The legitimate roots of privacy are found in implicit understandings about the relationship of families and government. Thus, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), this Court for the first time had the occasion to recognize the primacy of the family as an explicit part of our Constitutional scheme. The Court noted that Plato's *Republic* had suggested state-mandated separation of children and parents, and state-mandated infanticide, but concluded that such practices would do "violence to both letter and spirit of the [American] Constitution." 262 U.S. at 401-02. *Meyer* thus found that the Constitution incorporates certain understandings "upon which our institutions rest," *id.* at 402, and that these understandings include the special place of family relations.

Meyer chose to locate the *textual* protections of these implicit understandings in its interpretation of the "liberty" protected by the due process clause. Thus, the Court stated that liberty denotes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," including "the right of the individual . . . to marry, establish a home and bring up children." 262 U.S. at 399.

The legitimacy of *Meyer* and its progeny[3] was called into question by the Court's subsequent abandonment of economic substantive due process, beginning with its 1937 decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379. One year later, the Court in the famous footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), began to suggest new bases and guidelines for heightened judicial review. The *Carolene Products* footnote four suggested that *Meyer* and its progeny properly protected discrete and insular religious and ethnic minorities. *See* 304 U.S. at 152 n.4. Thus, *Carolene*

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[3] *Meyer*'s immediate progeny include its companion case, *Bartels v. Iowa*, 262 U.S. 404 (1923), and two subsequent decisions: *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Farrington v. Tokushige*, 273 U.S. 284 (1927).

Products represents the nascent insight that substantive protection of parental and family rights could facilitate both the political process and the protection of religious and ethnic minorities.

Carolene Products evidences the Court's determination to maintain the validity of *Meyer* and its progeny, despite the abandonment of economic substantive due process. Four years later the Court, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), invalidated Oklahoma's sterilization of "habitual criminals." Justice Douglas began his opinion by stating that "[t]his case touches a sensitive and important area of human rights." 316 U.S. at 536. Later in the opinion he explained the linkage of this right to the protection of minorities:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.

316 U.S. at 541.

In time, it became clear that the Court could distinguish *Meyer* and its progeny from *Lochner* through a direct dichotomy of subject matter. Justice White's concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), exemplifies this approach:

> [T]his is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right "to marry, establish a home and bring up children," *Meyer*, and "the liberty ... to direct the upbringing and education of children," *Pierce*, and that these are among "the basic civil rights of man." *Skinner*. These decisions affirm that there is a "realm of family life which the state cannot enter" without substantial justification. *Prince*. Surely the right invoked

> in this case, to be free of regulation of the intimacies of the marriage relationship, "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* (opinion of Frankfurter, J.).[4]

381 U.S. at 502 (case citations shortened).

This Court's opinion in *Griswold* rhetorically echoed *Meyer*'s presumption that the family is more basic than the state and thus deserves judicial and constitutional protection from the state. 381 U.S. at 486 (privacy predates Bill of Rights). Similarly, in *Loving v. Virginia*, 381 U.S. 1 (1967), this Court again reaffirmed that marriage was a fundamental right and held that miscegenation prohibitions violated both the equal protection and due process clauses.

III. *Roe v. Wade* and its Progeny are Part of a New and Different Autonomy Privacy Right Which Has Threatened to Destroy and Displace the Court's Prior Fifty-Year Heritage of Protecting Family Privacy

The Court's concepts of substantive due process and privacy from the 1920's through the 1960's rejected the view that consenting adults (and mature minors) have a generalized fundamental right to make choices, of whatever nature, regarding human sexuality and procreation. The rejection of such a view was clearly stated by Justice Harlan:

> [T]he very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and

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[4] Justice White's quotation of Justice Frankfurter's *Kovacs* concurence appears to imply that protection of the family, like free speech, is essential to an open society. Cf. *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J, concurring).

> that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must be built upon that basis.

Poe v. Ullman, 367 U.S. at 545-46; *see also Griswold v. Connecticut*, 381 U.S. at 498 (1965) (Goldberg, J. concurring, joined by Warren, C.J., and Brennan, J.) (statutes prohibiting adultery and fornication are "beyond doubt" constitutional).

Yet, despite such assurances, and Justice Harlan's admonition against judges "roaming at large in the constitutional field," *Griswold*, 381 U.S. at 502, the process of transforming the privacy right began with Justice Brennan's 1972 *dictum* in *Eisenstadt v. Baird*:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

405 U.S. at 453.

Justice Brennan's reference to "the decision whether to bear or beget a child," written at a time when *Roe* was before the Court, appears to include the abortion decision. This *dictum* implied a constitutional equivalency between childbirth and abortion and between marital and nonmarital sexuality. Thus, in a few words Justice Brennan signaled the creation of a broad new right that protected as a fundamental right abortion, fornication, and sodomy. ***This new individualistic, purportedly value-neutral right of choice was in actuality a different right than that recognized by the Court during the preceding fifty years.***

The Court's privacy decisions since the early 1970's have been confused. This confusion has been caused by the inability of any single theory of privacy to completely dominate the Court's decisions. Thus, Justice Brennan's view that fornication and sodomy are included as fundamental privacy rights has been rejected, *see Bowers v. Hardwick*, 478 U.S. 186, 195-96 (1986) (refusing to protect adult consensual sodomy in part because such a holding would necessarily extend to other consensual adult conduct), even as his view that abortion is included was accepted. Similarly, the Court rejected Justice Brennan's view that the abortion right requires equal funding of abortion and childbirth. *See, e.g., Harris v. McRae*, 448 U.S. 297 (1980); *id.* at 329 (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting). This precedential confusion is a product of the varying views of Chief Justice Burger and Justices Powell and Stewart, who sometimes sided with, and sometimes against, the new theory of privacy-as-autonomy. Thus, Justices Brennan, Blackmun, Marshall, and Stevens were unable fully to translate their new vision of privacy into binding authority. Overall, however, it is clear that Justice Brennan's *individualistic* privacy, which this brief shall label *privacy-as-autonomy*, has overshadowed the preexisting theory of marital and family privacy, particularly in the area of abortion.

Privacy-as-autonomy has purported to protect all choices concerning certain subjects equally, thus rejecting Justice Harlan's teaching that the Constitution must reflect deeply rooted American moral traditions regarding sexuality and pro-

creation. In practice, however, privacy-as-autonomy has failed to achieve value neutrality. Thus, privacy-as-autonomy has in practice demonstrated a marked preference for protecting traditionally immoral or destructive conduct such as abortion over traditionally protected conduct such as childbirth and parental rights. This preference can be seen in three ways.

First, since privacy-as-autonomy appeared in the early 1970's, the Court's development of family privacy as a doctrine has atrophied. Thus, the Court has ignored significant conflicts in the last two decades over issues such as midwife-assisted home birth and home-schooling. The Court's activism in the area of abortion has corresponded to disinterest in childbirth and parental authority.

Second, the Court's decisions on abortion have betrayed a preference for abortion over childbirth. This preference is well illustrated in the Court's holding in *Thornburgh* regarding Pennsylvania's prior informed consent law. *Roe* purported to take a morally-neutral position and protect both the abortion decision and the traditionally-protected decision to give birth. This moral neutrality was supposedly consonant with a constitutionally-enforced relativism regarding the moral status of the fetus. Presumably the individual woman, rather than the state, was to evaluate the worth of the fetus. Yet when Pennsylvania tried to ensure that women make this decision with access to the facts of fetal development, the Court characterized the information as "inflammatory," 476 U.S. at 762 n.10, and rejected the attempt, stating that the information "may serve only to confuse and punish her and to heighten her anxiety." 476 U.S. at 762. The Court complained that the information "is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." *Id.* Yet *Thornburgh*'s author, Justice Blackmun, personally views fetal characteristics as highly relevant to the valuation of the fetus. *See Webster v. Reproductive Health Serv.*, 492 U.S. 490, 552-53 (1989) (Blackmun, J., dissenting) (quoting *Thornburgh*, 476 U.S. at 778-79 (Steven, J., concurring)) (state's interest in fetus grows as fetus develops capacities to respond, feel pleasure and pain,

and survive). *Thornburgh*'s holding that accurate and relevant information is constitutionally suspect because it discourages women from choosing abortion indicates that *Roe* is a pro-abortion, rather than a pro-choice, decision.

Third, privacy-as-autonomy's preference for unconventional and destructive rights, over traditional family and marital rights has appeared in cases where the interests and rights represented by the two theories of privacy collide. This occurs in parental involvement statutes. Parental involvement statutes are a way of facilitating and protecting several interests under the traditional family sphere theory of privacy. Such interests include the parent's authority over their minor daughter's decisionmaking, parental involvement in the important events of their children's lives, the parental right to raise and instruct their offspring within a particular culture and belief system, and the integrity of the family unit. These rights and interests are inherent in this Court's acknowledgment of the primacy of the family over the state in *Meyer* and *Pierce*. Yet when this well-established parental right conflicted with the newly invented abortion autonomy right, Justice Blackmun's majority opinion broadly concluded that:

> Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.

Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).

Similarly, spousal involvement statues facilitate, recognize and protect several interests under the traditional family sphere theory of privacy. Thus, *Meyer* recognized the liberty interest of men and women "to marry, establish a home and bring up children." 262 U.S. at 399. *Skinner v. Oklahoma* recognized that "marriage and procreation" are fundamental rights while invalidating a program of male sterilization. Thus, the Court has recognized that men possess a fundamental right to procreate within marriage. Similarly, men possess, like women,

a fundamental right to the care and custody of their children, *see, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982), which includes a fundamental right to preserve the life and health of their children, both born and unborn. Yet, when these traditional rights and interests collided with the newly-created abortion right, Justice Blackmun's majority opinion clearly chose the new form of autonomy privacy over the fifty-year-old right of marital and family privacy. *See Danforth*, 428 U.S. at 69-71. Justice White's dissent aptly protested this choice:

> It is truly surprising that the majority finds in the United States Constitution ... a rule that the State must assign a greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child.

428 U.S. at 93.

Thus, abortion autonomy theory has gone beyond Justice Blackmun's call, in his dissenting opinion in *Bowers v. Hardwick*, for a morally-neutral privacy right, *see* 478 U.S. at 205-06, to a deliberate preference for the unconventional over the conventional. *See Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (plurality opinion of Scalia, J.). Thus, *privacy-as-autonomy has illegitimately incorporated the arbitrary value preferences of the Justices into the Constitution, while denigrating the deeply-rooted traditions of the American people.* Most disturbingly, this preference for the "unconventional" has included elevating to a super-protected status the inherently destructive act of destroying fetal life.

IV. THIS COURT'S PRIOR RECOGNITION OF THE "INHERENTLY DIFFERENT" AND INHERENTLY DESTRUCTIVE NATURE OF ABORTION AFFORDS SUFFICIENT REASON TO REMOVE ABORTION FROM THE REALM OF FUNDAMENTAL PRIVACY RIGHTS

This Court has been aware, from the beginning, of the inherently destructive nature of abortion. Thus, in *Roe* Justice Blackmun noted that

> [t]he pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-79, 547 (24th ed. 1965). The situation therefore is *inherently different* from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold, Stanley, Loving, Skinner*, and *Pierce* and *Meyer* were respectively concerned.

410 U.S. at 159 (emphasis added).

Similarly, the Court majority in *Harris v. McRae* specified that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." 448 U.S. 297, 325 (1980). Thus, this Court has specified that abortion is "inherently different" from previously accepted privacy claims, and from other medical procedures. One would have thought that this inherent difference would have been sufficient, at the very outset, to lead to a rejection of the claim that the abortion "liberty" was a fundamental right. Thus, although it is clear that parents have a right to the care and custody of their children, *see, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982), it has never been stated that parents possess a fundamental right to kill, torture, or abuse their children. *See Thornburgh v. ACOG*, 476 U.S. 747, 793 & n.2 (1986) (White, J., dissenting) (fundamental right of parents to make decisions regarding upbringing of children does not extend to assaults committed upon child). Similarly, although marital partners possess a fundamental right to marital intimacy, *see Griswold v. Connecticut*, 381 U.S. 479 (1965), it has never been suggested that a husband possesses a fundamental right to rape his wife. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989) (implying that rapist lacks fundamental right to the care and custody of child begotten through the rape).

One would have hoped that even a morally-neutral, individualistic theory of privacy would have recognized that inher-

ently destructive acts cannot be considered fundamental rights. Unfortunately, however, the current abortion privacy doctrine has not only recognized the abortion choice as a fundamental right, but has also elevated it above the more constructive choices. There is simply no credible explanation for why the "inherently different" act of abortion, *see* Roe, 410 U.S. at 159, — "inherently different" because it "involves the purposeful termination of a potential life," *Harris*, 448 U.S. at 325 — should be constitutionally elevated above more traditional privacy rights such as procreation and parental care and authority. The inherent difference, in logic and in law, between abortion and procreation, between destroying dependent life and protecting and preserving it, must, in accordance with the history and traditions of *this* people, cut against, rather than for, recognition of abortion as a fundamental right.

V. THE OVERRULING OF *ROE V. WADE* WOULD NOT REQUIRE THE REVERSAL OF *GRISWOLD V. CONNECTICUT*

The overruling of *Roe v. Wade*, including the exclusion of the abortion choice from the fundamental privacy right, would merely eliminate the worst excess of privacy-as-autonomy. Indeed, reversing *Roe v. Wade* on the ground of the "inherently different" and destructive nature of abortion would not even preclude reversal of *Bowers v. Hardwick*, since consensual adult sodomy, even if immoral, cannot be as inherently destructive as "the purposeful termination" of an innocent, biologically human life. Moreover, even if the reversal of *Roe* is combined with *Bowers v. Hardwick* to represent the repudiation of privacy-as-autonomy, such should not constitute the end of privacy itself. Privacy-as-autonomy began with Justice Brennan's *dictum* in *Eisenstadt* in 1972, or the holding of *Roe* in 1973, and thus is entirely severable from the older family sphere privacy which dominated the Court's decisions from 1923 to 1967. Indeed, the elimination of privacy-as-autonomy could strengthen the older family privacy, by restoring the

legitimacy of privacy as a doctrine, and by eliminating privacy-as-autonomy's tendency to disfavor traditional family rights.

Griswold illustrates the divisibility of family privacy from privacy-as-autonomy. *Griswold*'s holding and language is squarely based on the special place of marriage within American society. *See* 381 U.S. at 485-86. *Griswold*, in other words, is a case about the fundamental right of consensual *marital intimacy*. The Court's holding that marital intimacy is a fundamental right is, of course, firmly in line with the line of family privacy cases beginning with *Meyer*, and thus is supportable without any reference to privacy-as-autonomy.

One can ask why the Court in *Griswold* was justified in focusing on the general issue of consensual marital intimacy, rather than the more specific issue of marital use of contraception. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality, concurring and dissenting opinions discussing level of generality for privacy analysis). There are several reasons. First, in *Griswold* the State of Connecticut failed to argue that its statute was based on the moral judgment that marital contraception was immoral, and instead claimed that a ban on marital contraception was necessary to discourage extra-marital relations. 381 U.S. at 498 (Goldberg, J., concurring); *id.* at 505 (Harlan, J., concurring). Since the state did not morally or otherwise object to the very act it was prohibiting — the *use* of contraceptive articles within marriage — there was no need to restrict the constitutional analysis to the greatest level of specificity represented by the prohibition. Second, even if the State had supported its statute with a moral objection to marital contraception, there were obvious dangers that enforcing a ban on marital contraceptive use would interfere more broadly with marital intimacy. *See Griswold*, 381 U.S. at 485. This threat to marital intimacy made it appropriate to evaluate the statute in terms of American traditions regarding such intimacy. Third, even those who view consensual marital contraception as inherently immoral would acknowledge that such an immoral act does not cause the destruction of an innocent other. Marital contraception therefore is not an inherently destructive

act, in the same sense that assault, homicide, or rape are inherently destructive acts. The absence of an innocent victim lessens the need to evaluate American traditions at the greatest possible level of specificity.

By contrast, it is clear that in *Roe* the Court quite properly looked to the issue of abortion itself, rather than focusing more broadly on childbirth or procreation. First, in *Roe v. Wade* the state directly objected, in strong terms, to abortion itself, claiming that it constituted the wrongful taking of human life. *See* 410 U.S. at 159. In response, the *Roe* Court focused specifically on the history of *abortion*, rather than focusing more broadly on childbirth, procreation, or pregnancy. *See* 410 U.S. at 129-52. Second, the enforcement of abortion restrictions does not practically or otherwise endanger the freedom to carry a child to term, or any other freedom traditionally protected under family privacy. Thus, abortion is severable from childbirth and other family privacy rights far more easily than marital contraception can be severed from marital intimacy. This easy severability again suggests the importance of focusing abortion cases specifically on abortion. Third, inherently destructive acts logically must be constitutionally evaluated at a high level of specificity, even when those acts occur within a traditionally protected relationship. The *Roe* Court thus implicitly acknowledged its necessary focus on abortion, rather than broader privacy interests, when it stated that:

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus. . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education. . . .

410 U.S. at 159.

Thus, a claim that infanticide is constitutionally protected would necessarily be evaluated in regard to American traditions regarding infanticide, rather than American traditions more broadly focused on parental authority. Similarly, a claim

that marital rape is constitutionally protected would be evaluated in regard to American traditions regarding rape, rather than American traditions regarding marital intimacy. Abortion, since it almost always involves feticide ("the purposeful termination of" fetal life), similarly should be evaluated in terms of American traditions regarding abortion, without regard to broader traditions that are "inherently different," *id.*, such as "procreation." *Id.* Acts that are inherently destructive necessarily must be constitutionally evaluated in terms of American traditions regarding those specific, and destructive, acts.

Thus, *Griswold* quite properly should be viewed as a case about *marital intimacy*, while *Roe* necessarily stands or falls as a case about *abortion*.

VI. THE OVERRULING OF *ROE V. WADE* WOULD NOT REQUIRE THE REVERSAL OF *EISENSTADT V. BAIRD* AND *CAREY V. POPULATION SERVICES INTERNATIONAL*

This Court's holding in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), is simply that Massachusetts's limitations on the distribution of contraception violates the equal protection clause of the Fourteenth Amendment. The Court's four member majority refused to reach the question of whether the statute infringed a fundamental privacy right, *see* 405 U.S. at 453, and therefore applied the rational basis test. *See* 405 U.S. at 447. Thus, *Eisenstadt* is not, by its own terms, a privacy decision. The overruling of *Roe*, and application of the rational basis standard of review to abortion, therefore would have no affect on the Court's holding in *Eisenstadt*. The broad *dictum* in *Eisenstadt* implying that the right of privacy includes, as a fundamental right, the decision whether "to bear . . . a child," is completely gratuitous to the Court's holding. This dictum's apparent attempt to suggest the result in *Roe*, rendered when *Roe* was before this Court, is entirely severable from *Eisenstadt*'s holding.

Carey v. Populations Servs. Int'l, 431 U.S. 678 (1977), invalidated a Massachusetts law prohibiting the distribution of contraceptives to minors, and forbidding anyone other than a licensed pharmacist from distributing contraceptives to adults.[5] The majority of Justices rejected the application of heightened judicial scrutiny to the provision affecting minors;[6] the holding therefore is dependent on the view that the restrictions applicable to minors are irrational. Thus, this rational basis holding, like the rational basis holding in *Eisenstadt*, would not be affected by an overruling of *Roe*. However, a majority of Justices applied a form of strict scrutiny to the statute requiring a pharmacist to distribute contraceptives to adults. This majority concluded that this limitation on distribution infringed the privacy rights of individual adults to access contraceptives.

Overruling *Roe* would not require overruling of *Carey*'s holding regarding the access of adults to contraceptives. First, this Court could sever abortion from the realm of fundamental privacy rights because of its "inherently different" and inherently destructive effect of "terminat[ing] a potential life." *See Roe*, 410 U.S. at 159; *Harris v. McRae*, 448 U.S. at 325; section IV, *supra*. Such a holding would not require any reexamination of this Court's contraception holdings because abortion is "inherently different" from contraception. *See, e.g. Roe*, 410 U.S. at 159 (abortion inherently different from situation addressed in *Eisenstadt*); *Harris*, 448 U.S. at 325 (abortion inherently different from other medical procedures).

Second, the core holding of *Carey*, invalidating the limitation of contraceptive distributors to pharmacists, is sustainable

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[5]The New York statute specifically permitted pharmacists to distribute contraceptives to those 16 and over. The Court's discussion viewed this as a limitation upon distribution to "adults." *See* 431 U.S. at 686. The Court also invalidated a limitation on contraceptive advertising on free speech grounds.

[6]*See* 431 U.S. at 702-03 (White, J., concurring); *id.* at 705-07 (Powell, J., concurring); *id.* at 713-16 (Stevens, J., concurring); *id.* at 717-19 (Rehnquist, J., dissenting); *id.* at 702 (Burger, C.J., dissenting without opinion).

under rational basis analysis, or under *Griswold*, insofar as the pharmacist requirement lacked any rational relation to health concerns and applied to both married and unmarried persons. *Cf. Eisenstadt*, 405 U.S. at 460-65 (White, J. concurring) (state failed to demonstrate health need for forbidding nonpharmacist from distributing vaginal foam to woman of unknown marital status), *cited with approval*, *Carey*, 431 U.S. at 687, 688, 690.

Third, *Carey* clearly rejected the view that recognizing the right to access or use contraceptives necessarily implied a recognition of a right "to put contraceptives to their intended use" by engaging in a sexual act. *See Carey*, 431 U.S. at 678 (Stevens, J., concurring); *id.* at 688 n.5 (majority opinion); *id.* at 694 n.17 (plurality opinion); *id.* at 702 (White, J., concurring); *see also Bowers v. Hardwick*, 478 U.S. at 195-96 (rejecting claim that all voluntary sexual conduct between consenting adults is within fundamental privacy right). Thus, *Carey, even if broadly interpreted*, granted a right for the unmarried to "use" contraceptives in only a very attenuated sense, in that the states were still free to prohibit the act of putting the contraceptive articles "to their intended use" by engaging in nonmarital sexual acts. One does not normally speak of having a right to "use" something if the state may prohibit its only intended "use." This paradox of permitting the prohibition of nonmarital sexual acts, while invalidating limitations on nonmarital contraceptive use and access, illustrates that even *Carey* does not depend on acceptance of a full-fledged autonomy right in the area of consensual sexuality. Rather, *Carey* stands for the proposition that it is irrational to punish nonmarital sexuality by limiting access to contraceptives, particularly given the negative personal and social consequences of single parenthood and sexually-transmitted diseases. *See Carey*, 431 U.S. at 695 (quoting *Eisenstadt*, 405 U.S. at 448); *Carey*, 431 U.S. at 715 (Stevens, J., concurring) (state cannot dramatize its disapproval of motorcycles by forbidding use of safety helmets).

This view of *Carey* as granting unmarried individuals the right to ameliorate the negative consequences of illegal, immoral, or dangerous sexual activity through the use of contraceptives, also readily distinguishes the Court's contraceptive cases from *Roe* and its progeny. Avoiding the negative personal and social consequences of unwanted pregnancy through the "purposeful termination of a potential life," *Harris*, 448 U.S. at 325, an act which this Court acknowledged to be "inherently different" from contraception, *see Roe*, 410 U.S. at 159 (distinguishing *Eisenstadt*), is unjustifiable because it permits one person to displace the negative consequences of their own behavior upon an innocent, developing human life. By contrast, *Carey* permits avoidance of the negative consequences of one's behavior through a means — the use of contraception — that in itself has no effect upon innocent life. Similarly, the state's compelling interest in fetal life is directly served by abortion-restrictive legislation, whereas the state interest in protecting the health and life of contraception users is hindered, rather than served, by laws limiting access to nonmarital use of contraception.

Thus, there are ample and multiple approaches by which this Court could retain its holdings in *Eisenstadt* and *Carey* while overruling *Roe v. Wade*.

VII. A CONSTITUTIONAL LINE CAN BE DRAWN BETWEEN CONTRACEPTION AND ABORTION

The *Roe* Court implicitly criticized the view that life begins at conception, claiming that

> [s]ubstantial problems . . . are posed . . . by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs.

410 U.S. at 161 (footnote omitted).

More recently, Justice Stevens has claimed that a declaration that life begins at conception "implies regulation not only of previability abortions, but also of common forms of contraception such as the IUD and the morning-after pill." *Webster*, 492 U.S. at 563 (footnote omitted). Justice O'Connor has suggested that "[i]t may be correct that the use of postfertilization contraceptive devices is constitutionally protected by *Griswold* and its progeny." 492 U.S. at 523.

Despite these claims and concerns, this Court is quite capable of drawing a constitutional line between contraception and abortion. Indeed, drawing a constitutional line by reference to the biological event of conception would be easier than, or as easy as, reliance on the biological demarcations of birth and viability which the *Roe* Court employed.

The *Roe* Court clearly drew a constitutional line at birth, holding that the unborn are not constitutional persons for purposes of the due process clause. 410 U.S. at 156-59. Yet birth, like fertilization, is clearly a "process over time." Is a fetus a constitutional person during the second stage of labor, as the woman pushes the fetus through the birth canal? Must the cord be cut before the fetus attains constitutional personhood? These questions are no easier than the question of whether one chooses the beginning point of fertilization, when the sperm enters the ovum, or the point, approximately 24 hours later, when the process of the sperm and ovum genetically uniting has been completed. Certainly, there is nothing particularly problematic about the fact that the fertilization process takes 24 hours, given the fact that birth itself, beginning with the first stage of labor, can take several days. If this Court can draw a constitutional line by reference to the biological process of birth, it can surely also do so by reference to the biological process of fertilization.

Similarly, the *Roe* Court employed the biological concept of "viability" to determine when the State's interest in fetal life became "compelling." 410 U.S. at 163. Viability is a far less precise biological concept than fertilization. First, viability is not an inherent characteristic of the fetus, but rather is a con-

sequence of the relationship between the fetus and changing medical technology. Second, different fetuses' achieve viability at different stages, making it difficult to draw a generalized line. Third, the determination of viability requires a difficult medical determination in which physicians can easily err by as much as four weeks. *See Webster*, 109 S.Ct. at 3055 (citing finding by District Court). Even the *Roe* Court could do no more than generalize that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." 410 U.S. at 160 (footnote omitted). Clearly, a constitutional line can be drawn far more easily at fertilization or conception, than could be done at viability.

The purpose of comparing a fertilization line to a birth or viability line, is not to support the Court's prior uses of birth or viability, but merely to demonstrate the specious nature of a claim that fertilization cannot serve as a constitutional line. It can also be asked, however, whether fertilization *should* serve as a constitutional dividing point. The primary argument against the use of such a line has been that it would interfere with "common forms of contraception such as the IUD and the morning-after pill." 492 U.S. at 563 (Stevens, J. dissenting).

This fear is largely illusory. First, there is no indication that any State wishes to prohibit any currently legal forms of contraception. Pennsylvania's current effort to regulate abortion incorporates that State's 1982 definition of abortion, which limits abortion to:

> [t]he use of any means to terminate the clinically diagnosable pregnancy of a woman with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the unborn child except that, for the purposes of this chapter, abortion shall not mean the use of an intrauterine device or birth control pill to inhibit or prevent ovulation, fertilization or the implantation of a fertilized ovum within the uterus.

18 Pa. Cons. Stat. Ann. § 3203 (Purdon 1983).

Similarly, Guam's post-*Webster* prohibition of abortion, which is currently pending before the Ninth Circuit, defines abortion as "the purposeful termination of a human pregnancy *after implantation of a fertilized ovum*. . . ." Guam Public Law 20-134, Sec. 2 (9 G.C.A. § 31.20). Utah's post-*Webster* prohibition also only applies "after implantation of a fertilized ovum." Utah Code Ann. § 76-7-301(1) (Supp. 1991). Thus, Pennsylvania, Guam and Utah by their definitions of abortion have excluded from coverage the period prior to implantation, with the obvious intent of avoiding possible applications to contraceptives; Pennsylvania has made this intent most explicit by expressly excluding application to the IUD and birth control pill.

Louisiana's post-*Webster* prohibition defines abortion to include certain acts performed with "the specific intent of terminating a pregnancy." La. Rev. Stat. § 14:87(A)(1) (West Supp. 1992). This specific intent requirement would limit the act of performing an abortion to those instances where the woman was specifically known to be pregnant when the drug was prescribed or the device inserted. Thus, this specific intent requirement alone would exclude any application to currently used contraceptives. *Cf.* Op. La. Att'y Gen. No. 91-419 (August 29, 1991) (current Louisiana abortion prohibition does not apply to IUD, oral contraceptives, or morning-after pill); *Margaret S. v. Edwards*, 488 F. Supp. 181, 190-91 (E.D. La. 1980) (holding that prior Louisiana definition of abortion does NOT include the IUD, morning-after pill, and birth control pills).

Thus, Pennsylvania's regulations, along with the post-*Webster* abortion prohibitions, do not implicate currently-used contraceptives, and usually exclude from coverage the period prior to implantation.

In addition, there are in fact no commonly used forms of contraceptives whose *primary mechanism* is that of an abortifacient. Thus, the prior belief that the IUD works primarily by preventing implantation has since been superseded by new research indicating that its primary mechanism is to prevent

fertilization.[7] Similarly, current research demonstrates that the primary mechanism of oral contraceptives, including low-dose oral contraceptives, is to prevent fertilization.[8] The adoption of a constitutional fertilization line would presumably classify contraceptives according to their primary and known anti-fertilization effects. Thus, the existence of low or speculative back-up abortifacient effects would not subject contraceptives to state regulation, even under a fertilization standard.

The morning-after pill also poses no true dilemma. First, this treatment currently has too many side-effects to recommend its regular use in place of true contraceptives.[9] Thus, its only real use is with rape victims. Generally, such use with rape victims would not be classified as an abortion, because definitions of abortion generally either exclude the period prior to implantation, or at least require (sometimes through an intent requirement) that the woman be known to be pregnant. Thus, early treatment of the rape victim, when it is not known whether she has been impregnated, could not be classified as an abortion. In addition, the abortion prohibitions passed in a post-*Roe* era are likely to contain express or implied rape and incest exceptions. Under these circumstances, it is extremely unlikely that any state would bar the only practical use of the morning-after pill.

This Court need not resolve the question of whether the constitutional line between abortion and contraception

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[7] *See* Alvarez, *New Insights on the Mode of Action of Intrauterine Contraceptive Devices in Women*, 49 Fertility and Sterility 768 (1988); Segal, *Absence of Chorionic Gonadotropin in Sera of Women Who Use Intrauterine Devices*, 44 Fertility and Sterility 214 (1985). The abortion rights brief in *Webster* submitted on behalf of the Association of Reproductive Health Professionals agreed, based on the Alvarez study cited *supra*, that "[t]he most likely working mechanism of an IUD is to prevent fertilization." ARHP Amicus Brief at 34, *Webster*, (No. 88-605).

[8] *See, e.g.*, Alan Guttmacher Institute, Making Choices 3 (1989); David M. Smolin, *Abortion Legislation After* Webster v. Reproductive Health Services: *Model Statutes and Commentaries*, 20 Cumb. L. Rev. 71, 124 n.153 (1989) (citing studies on oral (including low-dose) contraceptives).

[9] *See, e.g., Postcoital Contraception*, The Lancet, Apr. 16, 1983, at 855.

should be drawn at fertilization, or at implantation, until a real controversy implicating this distinction comes before the Court. It is unlikely that any such dispute would come before this Court, at least in the context of contraception and abortion. Speculative conflicts between a fertilization and implantation standard, or unfounded and speculative claims regarding threats to contraceptive rights, should not distract from the conclusion that *either a fertilization or an implantation standard* would be preferable to *Roe*'s viability/birth standard.

VIII. THE OVERRULING OF *ROE V. WADE* WOULD NOT SANCTION STATE-COERCED ABORTION OR CONTRACEPTION

The fifty years of family privacy precedents that preceded *Roe v. Wade* provide ample protection against state-coerced abortion or contraception. Thus, the *Meyer* Court, at the very outset of the family privacy doctrine, concluded that state-mandated infanticide would violate the "letter and spirit of the Constitution," 262 U.S. at 402, despite the apparent endorsement of a policy of eugenic infanticide by Plato in Book V of *The Republic*. Plato's eugenic proposals in Book V also extended to state-mandated abortion.[10] *Meyer* requires this Court to protect women, whether married or single, from state-coerced practices that are inimical to the "ideas touching the relation between individual and State . . . upon which our institutions rest." 262 U.S. at 402. Thus, *Meyer* in itself provides an ample basis for invalidating state-mandated abortion and contraception.

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[10] "But when . . . the men and the women have passed the age of lawful procreation, we shall leave the men free to form such relations with whomsoever they please . . . first admonishing them preferably not even to bring to light anything whatever thus conceived, but if they are unable to prevent a birth to dispose of it. . . ." Plato, *The Republic*, bk. v, marginal pagination 461 b-c (P. Shorey trans.), *reprinted in* The Collected Dialogues of Plato 700 (eds. E. Hamilton & H. Cairns, 1961).

In addition, a pregnant woman, whether single or married, represents a family dyad of mother and unborn child, and under this Court's family privacy precedents the State cannot arbitrarily interfere with a constructive, nurturing parent-child relationship. *See Caban v. Mohammed*, 441 U.S. 380, 405 n.10 (1979) (Stevens, J., dissenting) (psychological bond between mother and child develops during pregnancy); *see, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982). Finally, cases such as *Skinner v. Oklahoma*, protecting individuals, whether single or married, from state-mandated sterilization, afford an ample basis to reject state-coerced abortion or contraception.

Thus, the reversal of *Roe v. Wade* would not sanction state-coerced abortion or contraception, or any other state mandates affecting procreation or the family that are inimical to the "ideas ... upon which our institutions rest." Given the history and traditions of *this* people, which place a high value on unborn life and the right to procreate and bear children, state-coerced abortion and contraception would be unconstitutional. *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion) (due process clause prevents "future generations from lightly casting aside important traditional values").

CONCLUSION

Pennsylvania in this case has attempted to regulate abortion in a modest way, in the service of interests and rights that have been central to the development of the doctrine of privacy. Pennsylvania's modest incursions into the abortion "liberty" in the name of prenatal life, the right of procreation, and parental care and authority give this Court an opportunity to choose between two kinds of privacy: the theory of family privacy protected by this Court from 1923 to 1967 and the newer abortion and autonomy privacy that is less than two decades old. *Amicus curiae* submits that the abortion right invented by this Court in *Roe* represents a radical departure from "the balance struck by this country," while the family privacy right represents a sound

interpretation of our living constitutional traditions. *Cf. Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). This radical departure has exacerbated deep divisions within this nation by severely limiting the ameliorating possibilities for legislative activity and compromise. The healing of these deep divisions cannot begin until this Court restores the privacy doctrine to its proper foundations.

Amicus curiae urges this Court to uphold the constitutionality of the Pennsylvania statutes under review, and to adopt a rational basis standard of review that makes it plain that abortion is not within the right of privacy.

Respectfully submitted,

TONY G. MILLER, *Attorney for Southern Center for Law & Ethics*

TONY G. MILLER
Southern Center for Law & Ethics
P.O. Box 380113
Birmingham, Alabama 35238

DAVID M. SMOLIN
Associate Professor of Law
Cumberland School of Law
Samford University
Birmingham, Alabama 35229